FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 13

HARRY R. THOMAS, Executor of the Estate of Crandal Mackey, Deceased, *Petitioner*,

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

BRIEF FOR THE PETITIONER

CORNELIUS H. DOUGHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of Case	3
Argument	5
The Decision in This Case, in Holding That the Cash Was Intangible Personal Property, is in Direct Conflict With a Decision of This Court	5
The Assessment of an Inheritance Tax by the State of Virginia, Supported by the Judgment of its Court, on the Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars, in Cash, in the District of Columbia, Was a Taking of Property Without Due Process of Law and in Violation of Petitioner's Rights Under the Fourteenth Amendment	8
United States Currency is Tangible Personal Property	11
Conclusion	13

CASES CITED

Blodgett v. Silberman, 277 U. S. 1	2, 6, 8, 13
Curry v. McCanless, 307 U. S. 357	11
Frick, et al. v. Pennsylvania, 268 U. S. 473	8
Nortz v. United States, 294 U. S. 317	12
Pearson v. McGraw, 308 U. S. 313	11
Pullman's Car Company v. Pennsylvania, 141 U. S. 18, 22	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 733

HARRY R. THOMAS, Executor of the Estate of Crandal Mackey, Deceased, *Petitioner*,

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

BRIEF FOR THE PETITIONER

OPINION BELOW

The memorandum opinion of the trial judge of the Circuit Court of Arlington County, Virginia, has not been officially reported but a copy of the opinion has been made a part of the record (R. 6).

JURISDICTION

The judgment of the Circuit Court of Arlington County, Virginia, became final upon the refusal of the Supreme Court of Appeals of the Commonwealth of

Virginia to grant a writ of error on the 27th day of November, 1959.

This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C.A., § 1257 (3).

The action of the respondent was in violation of Section 1 of the Fourteenth Amendment to the Constitution, the material part of which is as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The judgment of the Circuit Court of Arlington County, Virginia, is in conflict with the decision of this Court in *Blodgett* v. *Silberman*, 277 U.S. 1.

QUESTIONS PRESENTED

Was the Circuit Court of Arlington County, Virginia, in error in holding that the Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars, consisting of United States currency, commonly known as paper money, in a safe deposit box in the Second National Bank in the District of Columbia, in the name of the decedent at the time of his death, was intangible personal property and a proper subject of assessment for inheritance tax purposes by the State Tax Commission of Virginia.

Was the action of the State Taxing authority of the Commonwealth of Virginia, in assessing the Two Hundred Sixty-Three Thousand One Hundred

($263,100.00) Dollars, consisting of United States currency, commonly known as paper money, located in a safe deposit box in the Second National Bank in the District of Columbia, in the name of the decedent at the time of his death, as intangible personal property and subject to the payment of an inheritance tax in Virginia, supplemented by the judgment of the Circuit Court of Arlington County, Virginia, a taking of property without due process of law in violation of petitioner's rights under the Fourteenth Amendment?

STATEMENT OF CASE

Crandal Mackey, a member of the bar of this Court, of Virginia, and the District of Columbia, where he maintained his office until his last illness, died March 31, 1957, domiciled in Arlington County, State of Virginia, and letters testamentary were granted to Harry R. Thomas, as the Executor named in his will, by the Circuit Court of Arlington County, Virginia (R. 1).

Ancillary letters were also granted to Harry R. Thomas in the District of Columbia.

Among the assets of the estate was the sum of Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars in United States currency located in a safe deposit box in his name in the Second National Bank in Washington, D. C. (R. 2).

The taxing authority of the District of Columbia concluded that this cash was a tangible asset of the decedent's estate and included it in its assessment of inheritance tax due the District of Columbia, and your petitioner paid this tax (R. 2).

The State Tax Commission for Virginia declared that the Two Hundred Sixty-Three Thousand One

Hundred ($263,100.00) Dollars was an intangible asset of the estate and that it should be assessed as a part of the estate for inheritance tax purposes and assessed the entire tax at Twenty Thousand Three Hundred Seventy-Eight Dollars and Twenty-six Cents ($20,378.26). Your petitioner paid the sum of Thirteen Thousand Seven Hundred Ninety-Five Dollars and Thirty-three Cents ($13,795.33), the amount due excluding the tax on the Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars, leaving a balance of Sixty-Five Hundred Eighty-Two Dollars and Ninety-three Cents ($6,582.93) (R. 2).

An application for relief from such assessment, under the provisions of Title 58, Section 182 of the 1950 Code of Virginia, was filed in the Circuit Court of Arlington County, Virginia (R. 1). It contained, among other things, in paragraph 5-(c), the statement that the Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars was tangible personal property not located within the State of Virginia and that it was not a proper subject of assessment for inheritance taxes by the State Tax Commission of Virginia, and that such assessment is in violation of the laws of the United States in that it is lacking in due process of law and denies to your petitioner the equal protection of law guaranteed to him by the Constitution (R. 2).

The matter was argued on bill and answer and your petitioner contended that on the basis of the decision of this Court in Blodgett v. Silberman, supra, that the cash in the District of Columbia was tangible personal property assessable in the District of Columbia and that any attempt by the taxing authority of the Commonwealth of Virginia to levy a tax on this property

would violate the due process clause of the Fourteenth Amendment.

On June 3, 1959, a memorandum was filed by William D. Medley, Judge, holding that the Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars, in currency in the safe deposit box in the Second National Bank in the District of Columbia at decedent's death, was intangible personal property and a proper subject of assessment for inheritance tax by the State Tax Commission of Virginia, and a judgment entered thereon against your petitioner in the sum of Sixty-Five Hundred Eighty-Two Dollars and Ninety-three Cents ($6,582.93), with interest at one per centum per month from June 30, 1958, until paid (R. 6-7).

A petition for the allowance of an appeal was timely filed in the Supreme Court of Appeals of Virginia at Richmond, in which it was asserted that any attempt to levy such a tax violated the due process clause of the Fourteenth Amendment.

The petition for the allowance of an appeal to the Circuit Court of Arlington County, Virginia, was denied on November 27, 1959 (R. 9).

ARGUMENT

The Decision in This Case, in Holding That the Cash Was Intangible Personal Property, is in Direct Conflict With a Decision of This Court

It was necessary that your petitioner file an inheritance tax return in the District of Columbia covering real estate and tangible personal property having its situs in the District of Columbia. The taxing authority of the District of Columbia concluded that the Two Hundred Sixty-Three Thousand One Hundred

($263,100.00) Dollars, in cash, in a safe deposit box in a bank in the District of Columbia at decedent's death was tangible personal property and as such was subject to its assessment for inheritance tax purposes.

The District based its decision that it was tangible personal property upon the statement contained in the opinion of this Court in the case of *Blodgett* v. *Silberman*, *supra*, at page 18, which is as follows:

> "There was a small amount of cash, $287.48, in bank notes and coin in a safe deposit box in New York which the Supreme Court of Errors held not taxable in Connecticut. As to this, the contention on behalf of Connecticut is that it should be treated as attached to the person of the owner and subject to a transfer tax at the domicil. It is argued that it was not like coin or treasure in bulk, but like loose change, so to speak. To money of this amount usually and easily carried on the person, it is said that the doctrine of mobilia sequuntur personam has peculiar application in the historical derivation of the maxim. But we think that money, so definitely fixed and separated in its actual situs from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the Frick case to be taxable only in the jurisdiction where they were."

Your petitioner, in reliance upon this opinion, paid the tax so assessed in the District of Columbia.

Your petitioner further, on the basis of the opinion of this Court in the *Blodgett case*, opposed the imposition of a tax by the Tax Commission of the State of Virginia on the cash in the District of Columbia but the tax was assessed.

The Commonwealth, in its answer to petitioner's application for relief which was filed in the Circuit

Court of Arlington County, stated that it had correctly included the sum of Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars, consisting of United States currency located in a safe deposit box in the Second National Bank of Washington, D. C., in the total assessment for Virginia inheritance tax purposes. It further states that it was intangible personal property, the situs of which for assessment of Virginia inheritance taxes was at the place of residence of the decedent owner at the time of his death (R. 4-5).

This Court can take judicial notice of the fact that a safe deposit box can only be opened by the owner of that box or someone authorized by him, with a key retained by him, together with the key held by the bank. In this way only could the United States currency be removed from the box. It could not be obtained in the same way as money which was deposited in the bank and had become co-mingled with the funds of others and which gave to the depositor the right to draw upon this account. The United States currency in the safe deposit box was something real and tangible and which could be controlled entirely by the owner of the box in the District of Columbia.

It is contended that your petitioner properly relied upon the decision of this Court in refusing to pay this tax and that the Circuit Court of Arlington County was in error in entering a judgment for the amount of the tax.

The Assessment of an Inheritance Tax by the State of Virginia, Supported by the Judgment of Its Court, on the Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars, in Cash, in the District of Columbia, Was a Taking of Property Without Due Process of Law and in Violation of Petitioner's Rights Under the Fourteenth Amendment

Your petitioner, in every way possible, raised the question that the assessment by Virginia of an inheritance tax on the Two Hundred Sixty-Three Thousand One Hundred ($263,100.00) Dollars was a taking of property without due process of law. The Circuit Court held that it was intangible personal property and properly taxable in Virginia. The Supreme Court of Appeals of Virginia denied an appeal with the statement that the order was plainly right.

If the decision of the Circuit Court is plainly right then the decision of this Court in *Blodgett* v. *Silberman, supra,* in stating that such cash was tangible personal property, and taxable at its situs, is plainly wrong.

In the case of *Frick, et al* v. *Pennsylvania,* 268 U.S. 473, is the following, at page 488 of the official reports:

> "The plaintiffs in error are the executors and an interested legatee. They contended in the state court, and contend here, that in so far as the Pennsylvania statute attempts to tax the transfer of tangible personal property having an actual situs in States other than Pennsylvania it transcends the power of that State, and thereby contravenes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.
>
> "The precise question has not been presented to this Court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first,

that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a State may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extra-territorial operation; and, thirdly, that as respects tangible personal property having an actual situs in a particular State, the power to subject it to state taxation rests exclusively in that State, regardless of the domicil of the owner."

Again, at page 491, this Court said:

"Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the State of its situs, and that the laws of other States have no bearing save as that State expressly or tacitly adopts them — their bearing then being attributable to such adoption and not to any force of their own."

Again, at page 492, this Court said:

"The jurisdiction possessed by the States of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer."

Again, at page 493, this Court referred to the case of *Pullman's Car Company* v. *Pennsylvania*, 141 U.S. 18, 22, and said:

"'No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old

rule expressed in the maxim mobilia sequuntur personam, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs, the law of the place where the property is kept and used.' "

Finally, at page 496, this Court said:

"For the reasons which have been stated it must be held that the Pennsylvania statute, in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid."

Your petitioner, in good faith, has paid the tax due the District of Columbia, the situs of the cash, upon the basis of the decision of this Court in the Blodgett case, that currency is tangible personal property, and it is not necessary to cite further decisions of this Court to support the theory that the assessment of the inheritance tax by the Virginia taxing authority and the judgment of the Circuit Court of Arlington County in the sum of Sixty-Five Hundred Eighty-Two Dollars and Ninety-three cents ($6,582.93), with interest at one per centum per month from June 30, 1958, until paid, upon the basis that the cash was intangible personal property and subject to the tax in Virginia, was the taking of property without due process of law and in violation of petitioner's rights under the Fourteenth Amendment.

United States Currency Is Tangible Personal Property

The respondent, in its opposition to the granting of the writ of certiorari, relied greatly upon the opinion of Mr. Justice Stone, in the case of *Pearson* v. *McGraw*, 308 U.S. 313, to support its theory that currency was intangible personal property. The opinion of Mr. Justice Stone was dicta and was in no way material to the decision of this Court. This Court, at page 318, said:

> "Therefore we need not consider the nature of federal reserve notes, for in that posture of the case their taxability as such and in isolation from the whole transaction is not in issue."

The decision of Mr. Justice Stone would place United States currency in the same category as a promissory note or a certificate of stock. If the note or certificate of stock was lost or destroyed it could be proved by other evidence. If United States currency is lost or destroyed the owner could not obtain a new certificate to replace it, indicating clearly that United States currency is physical property, the same as a piece of jewelry.

Bouvier's Law Dictionery describes tangible property as that which may be felt or touched, it must necessarily be corporeal, but it may be real or personal.

The respondent also, in its opposition, refers to the opinion of this Court in *Curry* v. *McCanless*, 307 U.S. 357. This Court in its opinion in that case, at page 363, said:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for

purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

Again, at page 364, this Court said:

"The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax."

This Court, in the case of *Nortz* v. *United States*, 294 U.S. 317, had occasion to go into the matter of gold certificates and in its opinion, at page 326, said:

"Gold certificates under this legislation were required to be issued in denominations of dollars, and called for the payment of dollars. These gold certificates were currency. They were not less so

> because the specified number of dollars were payable in gold coin, of the coinage of the United States. Being currency, and constituting legal tender, it is entirely inadmissible to regard the gold certificates as warehouse receipts. They were not contracts for a certain quantity of gold as a commodity. They called for dollars, not bullion."

The foregoing statement of this Court is clearly in accord with its decision in *Blodgett* v. *Silberman*, *supra*, in stating that currency was not to be placed in the category of being merely evidence of the right to obtain anything. It was legal tender and in and of itself was a tangible piece of property.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of the Circuit Court of Arlington County, Virginia, should be reversed and judgment entered in favor of the petitioner.

Respectfully submitted,

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.

LAWRENCE W. DOUGLAS
404 Arlington Trust Building
Arlington, Virginia

HARRY LEE THOMAS
Court House Square
Arlington, Virginia

Attorneys for Petitioner